

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 14, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-2885-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-DEFENDANT,

v.

DANIEL ZEMBRUSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
GERALD P. PTACEK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Daniel Zembruski appeals from a judgment convicting him of delivery of tetrahydrocannabinols (THC) as party to the crime contrary to §§ 961.14(4)(t) and 939.05, STATS., upon his guilty plea. On appeal, Zembruski challenges the trial court's refusal to suppress evidence seized when

law enforcement officers entered his property, arrested him and conducted a search, all without a warrant.

When we review a trial court's suppression ruling, the court's findings of fact will be upheld unless they are clearly erroneous. However, whether those facts satisfy the constitutional requirement of reasonableness presents a question of law for independent review. *See State v. Jackson*, 147 Wis.2d 824, 829, 434 N.W.2d 386, 388 (1989). The parties do not dispute the relevant facts.

All of the events occurred on December 19, 1995. That morning undercover officer Anton purchased ten pounds of marijuana from Peter Montalvo. Montalvo then agreed to cooperate with police to set up his marijuana supplier. That afternoon Montalvo made a controlled delivery of \$9500 to Rudy Malke, who was arrested after he accepted the payment. Malke ultimately agreed to cooperate with law enforcement authorities by setting up his marijuana supplier, whom he identified as Zemruski. Malke set up a meeting with Zemruski in a telephone call during which Zemruski told Malke to "just pop over." However, Zemruski said nothing during the recorded conversation which indicated that he was anticipating that Malke would be delivering payment for a marijuana debt.

Surveillance began outside Zemruski's residence at approximately 5:00 p.m. Agent Willeford testified at the suppression hearing that it was dark and impossible to ascertain how many individuals were on the property. She observed several vehicles enter the property between 5:00 and 8:00 p.m. None of the vehicles left the property. Zemruski's property is rural, with a house set back from the highway and several outbuildings. The property is open and it would be

difficult for law enforcement to establish a perimeter or otherwise secure the property.

Malke, wearing a body wire and carrying \$9000 in identified currency, went to Zembruski's home to deliver payment for the marijuana. Twelve officers were assembled around Zembruski's property. Malke paid Zembruski in a shed adjacent to Zembruski's house, out of sight of the officers. After Malke handed Zembruski the currency, he gave a prearranged signal for the arrest. Thereafter, the officers entered Zembruski's home to arrest Zembruski. The officers then encountered Malke who indicated that Zembruski was in the shed.¹ Zembruski was arrested and the \$9000 in currency was recovered from his overalls.

For approximately one-half hour after his arrest, Zembruski sat with two officers in a police van parked in his driveway. During this period, Zembruski signed a form consenting to a search of his property. Evidence of drug activity was seized from the property. After receiving his *Miranda* rights, Zembruski made a statement implicating himself in a marijuana trafficking operation.

In ruling on the suppression motion, the trial court relied on testimony by Agent Willeford that the officers conducting surveillance at Zembruski's property had a limited view of activity on the property because it was dark, that several vehicles arrived and individuals were moving between the residence and outbuildings on the property, and the property was difficult to contain because it is in a rural area with open fields.

¹ For purposes of this appeal, the State concedes that the shed was within the curtilage of Zembruski's home.

The trial court noted the link between drug activity and weapons and found a real risk that evidence would be destroyed or secreted away given the number of individuals on the property and the officers' inability to secure the property's perimeter. The court also noted the likelihood that the suspect would flee considering that the transaction occurred in the dark at a rural property and that the nature of a drug transaction "is clandestine by its very nature." The court found that it was reasonable for the officers to believe that the delay inherent in procuring a warrant would greatly endanger safety and risk destruction of evidence and flight of the suspect. We conclude that the trial court's factual findings are not clearly erroneous based on the suppression motion record. We independently evaluate the reasonableness of the warrantless entry, arrest and search.

A warrantless, nonconsensual entry of a home or curtilage and warrantless arrest thereon are reasonable under the Fourth Amendment where there is probable cause coupled with exigent circumstances. *See State v. Smith*, 131 Wis.2d 220, 228, 388 N.W.2d 601, 605 (1986); *see also State v. Kennedy*, 193 Wis.2d 578, 584, 535 N.W.2d 43, 45 (Ct. App. 1995); *State v. Walker*, 154 Wis.2d 158, 183, 453 N.W.2d 127, 137 (1990).

"The exigent circumstances inquiry is limited to the objective facts reasonably known to, or discoverable by, the officers at the time of the entry." *State v. Kiekhefer*, 212 Wis.2d 460, 476, 569 N.W.2d 316, 325 (Ct. App. 1997). The exigent circumstances relevant to the instant case include a threat to the safety of the suspect or others, a risk that evidence will be destroyed, and a likelihood that the suspect will flee. *See State v. Kiper*, 193 Wis.2d 69, 89-90, 532 N.W.2d 698, 707-08 (1995). The basic test to determine whether exigent circumstances exist is an objective one: "Whether a police officer under the circumstances

known to the officer at the time reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape." *Smith*, 131 Wis.2d at 230, 388 N.W.2d at 606.

On the question of the potential that the defendant would flee or evidence would be destroyed, we note that an exigent circumstance is not present if law enforcement "could have staked out the premises, covering all exits, and then procured a warrant." *Id.* at 235, 388 N.W.2d at 607-08. Here, in contrast, evidence adduced at the suppression hearing indicated that the property is rural and difficult to secure, an unidentified and unknown number of individuals were present, and the event giving rise to probable cause, the drug payment to Zemruski, took place at night. Additionally, courts have recognized that drug activity often involves firearms, posing a threat to the safety of the officers. *See State v. Guy*, 172 Wis.2d 86, 96-97, 492 N.W.2d 311, 315 (1992).

Zemruski argues that law enforcement officers had sufficient information to obtain an anticipatory search warrant. An anticipatory search warrant is "a warrant that has been issued before the necessary events have occurred which will allow a constitutional search of the premises; if those events do not transpire, the warrant is void." *State v. Falbo*, 190 Wis.2d 328, 334, 526 N.W.2d 814, 816 (Ct. App. 1994) (quoted source omitted). The "probable cause determination in an anticipatory search warrant is the same as the probable cause determination in a conventional search warrant." *Id.* at 336, 526 N.W.2d at 817.

We conclude that law enforcement did not have probable cause to obtain an anticipatory search warrant. Prior to Malke's delivery of the recorded currency to Zemruski, the officers knew only that Malke, a recently arrested

informant, had implicated Zembruski in drug trafficking. While the statement of an ordinary citizen is entitled to a presumption of reliability, *see State v. Kerr*, 181 Wis.2d 372, 381, 511 N.W.2d 586, 589 (1994), information supplied by an informant is rendered suspect by the informant's expectation of a concession in the manner in which his or her criminal conduct will be addressed. *See State v. Friday*, 147 Wis.2d 359, 372, 434 N.W.2d 85, 90 (1989). Therefore, the officers sought to independently corroborate Malke's accusation against Zembruski by having Malke deliver a drug payment to Zembruski. *See State v. Lopez*, 207 Wis.2d 413, 426, 559 N.W.2d 264, 269 (Ct. App. 1996).

Once Zembruski accepted the currency from Malke,² Malke's allegation of Zembruski's involvement was corroborated. The chronology of events resulting in the development of probable cause and the exigent circumstances discussed above precluded obtaining a warrant, anticipatory or otherwise, to enter the property and arrest Zembruski. We conclude that a warrantless entry and arrest were reasonable. In light of this conclusion, we reject the challenge to the subsequent search.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

² The telephone conversation between Malke and Zembruski during which they arranged to meet at Zembruski's property did not establish anything other than that the two men would meet at the property. The purpose of the meeting was not discussed during the telephone conversation.

